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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1306

LEONARD C. JAQUES,
Appellant,

vs

STATE BAR GRIEVANCE ADMINISTRATOR,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF THE
STATE OF MICHIGAN

BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM APPEAL

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REPLY TO "STATEMENT"

Rather than direct his attention to the facts, as found by the state Supreme Court and upon which discipline was imposed, Appellee chooses to ignore those facts, and the protections afforded that conduct by the Constitution under which this country was founded, by taking refuge in the contention that "Appellant capitulated and offered to plead no contest to an amended allegation". Neither the "no contest" plea to which Appellee refers nor the amended charge played any part in the decision under review. The agreement represented by the plea was subsequently set aside and, at that point, become a legal and factual nullity. The amended allegation was found by the Supreme Court of

Michigan to have no factual support. Reliance by the Administrator can serve no useful function in enlightening this Court as to the issues before it. Quite the contrary. The apparent purpose is to persuade this Court to ignore the fact that the United States Constitution guaranteed to Mr. Jaques, as his birthright, that the conduct here in issue would not be subjected to infringement by the state.

The underlying suggestion seems to be that Appellant has admitted that he has violated Constitutionally permissible Disciplinary Rules. It may be readily dispelled. The "no contest" plea was submitted to the Hearing Panel after the testimony of a number of witnesses, including Appellant, had been received. In order to avoid the strain imposed by the continued hearings and concomitant publicity, and to simplify the issues for decision, a stipulation was entered into pertaining to the charge that he had sought union joinder in the mandamus action and an amended charge, subsequently dismissed by the state court, pertaining to a Mrs. Woolstenhulme.

As to the union joinder charge, Appellant had always acknowledged having sought joinder in the mandamus action to be brought on behalf of his client. With equal consistency, he has always contended that seeking joinder is not forbidden by the Disciplinary Rules. Upon the ruling by the state court that his efforts were within the ambit of the Disciplinary Rules, the consititutionality of those Rules, as construed, was brought in issue and pointedly addressed in the state court. By the agreement which was set aside, it was contemplated that the Panel would proceed from the pertinent facts to decide the controlling issue of law, whether efforts to obtain joinder of a union in a mandamus suit in the nature of a class action were proscribed. Thus, the effect of the agreement was to admit the underlying

facts but not, in any fashion, to concede that these facts constituted a violation of the disciplinary rules.

Relative to the amended Woolstenhulme charge, uncertain accusatory testimony had been received after Appellant had testified under cross examination. It was well understood by the parties and the panel that the nolo contendre plea [here inappropriately termed "no contest" by Appellee] would have the novel effect of a stipulation that no further testimony would be presented and that the Panel's duty to make findings of fact would be discharged on the basis of the testimony adduced, giving consideration to Appellant's denial that any such occurrence transpired. Amendment of the charges was premised on the understanding that the conduct charged was within the ambit of the Disciplinary Rules but that the truthfulness of the allegations of the fact was to be the remaining issue for decision by the Panel. By virtue of the unorthodox meaning attached to the nolo plea, the parties were able to stipulate to the facts on the one charge and confine the dispute to the legal consequence of the admitted facts, while, as to the other charge that was emphatically denied by Appellant, the parties were to confine the disagreement as to the question of fact of the happening of the event with the legal consequences following as the subject of agreement.

In accordance with Michigan law, a nolo contendre plea has the legal effect of resolving all issues of fact, leaving discipline to be imposed as if a guilty plea were entered. Not so in this instance by original decree of the Panel, urged and initially defined by counsel for the Grievance Administrator.

When the Grievance Administrator and the Panel recognized the significance of the scope of the stipulation as

clearly shown by the transcript of testimony when the plea was entered, both the Grievance Administrator and the Panel reneged and disavowed the stipulation previously reached and made this known to Appellant some three weeks later at a "Mitigation Hearing", whereupon the Panel and the Administrator sought to adopt a construction at variance with the original, special meaning carved out of the nolo contendre plea. Appellant thereupon moved to withdraw the plea but was denied that opportunity by the Hearing Panel ,whereupon he appealed to the Grievance Board, which then granted the motion. The case then proceeded to a full hearing before a different Panel.

Under these circumstances, the implication that Appellant has conceded misconduct is grossly inaccurate. He has, of course, admitted seeking joinder and is content to have this Court pass on the Constitutionality of those Rules which, for the first time in Michigan, have been interpreted in this cause as proscribing an attorney, in the representation of his client, from seeking to persuade the union to which his client's deceased belonged to join with him in seeking a Coast Guard investigation of the cause of death.

As to the amended charge, the Michigan Supreme Court has itself dismissed that charge for lack of evidentiary support. It is distressing, to say the least, to find the Administrator reduced to arguing allegations of which Appellant has been acquitted and which are not before this Court. If any response is necessary, it is enough to note that Appellant was subjected to a polygraph examination by Lyn Marcy, former chief staff instructor at the Keeler Polygraph Institute. Appellant furnished to the Administrator's office the results, which showed that he had passed the examination and that the examination confirmed Appellant's testimony that he had not committed the acts

charged against him save his efforts to obtain union joinder in the mandamus action.

The test results were offered into evidence with the further offer to subject himself to examination by a polygraph expert of the Administrator's choice. In addition, Appellant offered to present Mr. Marcy for any questioning deemed advisable by the hearing panel or Administrator. Notwithstanding these offers, the test results were not considered. Instead, the case continued to those hearings which produced the testimony which has been summarized in the Stipulation of Facts compiled by the parties hereto in the pending § 1983 action in the United States District Court for the Eastern District of Michigan. The same has been included at pages 42a-44a of the Jurisdictional Statement hertofore filed. It is those facts which frame the issues for review and upon which discipline was imposed.

The allegation of the Administrator (Motion at page 11) that Appellant spoke of the quality of his legal services is still another unseemly example of refusing to address the issues which are properly before this Court. Appellee's desire to argue matters unsupported by the facts and extraneous to the issues before the Court can only be construed as tacit recognition that the conduct in which he *did* actually engage was constitutionally protected. In fact, during the course of the conference with the union representative, any reference to prior cases was for the limited purpose of explaining that the proposed mandamus litigation, while not commonplace, was litigation which was viable and recognized with favor by the federal courts. If it were truly believed by the Administrator that Appellant had transgressed the Disciplinary Rule (DR 2-101) pertaining to "self-laudatory statements designed to

attract lay clients" most surely such charges would have been brought and Appellant afforded an opportunity to establish the frivolity thereof. By recognizing the lack of factual support for any such allegations, and therefore deciding that they could not be brought in good faith, Appellee has starkly attested by his conduct in the trial of this case that the accusations which he seeks to bandy about before this Court are wholly untenable.

REPLY TO APPELLEE'S ARGUMENT AS TO JURISDICTION

In support of the proposition that this Court lacks jurisdiction to entertain this appeal, Appellee asserts, in essence, that claims arising under the due process clause of the Fourteenth Amendment do not present federal questions (Motion at p. 11). He also argues that this Court lacks jurisdiction to construe and apply the First Amendment for the reason that no such issue was presented to or decieded by the state court (Motion at p. 5). Neither jurisdictional attack is well-founded.

The former proposition does not warrant an extended response. Suffice it to note that a plethora of authority demonstrates that this Court does indeed have jurisdiction to construe and apply the United States Constitution, including the Fourteenth Amendment thereto. To accept the invitation to hold otherwise would mark a great departure from those cases collected at 5 United States Supreme Court Digest, §§513-854, pp. 436-846 where claims founded on the due process clause have been decided by this Court.

In support of the latter proposition, Appellee relies on six cases, each of which was decided more than forty years ago. Their continuing validity, even in comparable fact

situations, is open to serious question. The more modern decisions demonstrate that this Court has taken an active role in the protection of our most precious and fundamental freedoms. No longer can difficult substantive questions be ignored by reliance on procedural niceties. More importantly, the facts of this case are so different, from a procedural standpoint, than those relied on by the Administrator, that upon close examination it will be seen that they furnish ample grounds for the exercise of jurisdiction over and above the grounds set forth herein and at pages 2-6 of the Jurisdictional Statement.

In *Herndon* v *Georgia,* 295 US 441, 443 (1935) and *Live Oak Association* v *Railroad Commission,* 269 US 354, 359 (1926), affirmance on *substantive* grounds was compelled because adequate independent state grounds existed in support of the state court judgment. In *American Surety Co* v *Baldwin,* 287 US 156, 166-169 (1932), the merits were addressed and the Appellant held not entitled to relief by reason of res judicata and the lack of merit as to the due process claim. Thus, these cases demonstrate a willingness to consider substantive constitutional claims, and do not countenance the deprivation of fundamental rights on purely procedural grounds. Therefore, any procedural pronouncements may be regarded as dicta.

McGarrity v *Delaware Bridge Commission,* 292 US 19 (1934) and the cases referred to in the preceeding paragraph are also readily distinguishable on the jurisdictional question as well. All address themselves to the appellate posture of a case where, (1), the federal question was not raised on direct review in the state court, (2), the state court decision on direct review does not address the federal question, (3), in denying a petition for rehearing, the

state court did not consider the merits of the federal question presented, and, (4), the state court decision did not impose a novel construction that first gave rise to the federal question. The precedential value is contingent on the existence of those four factors. Here, none exist.

A primary purpose served by the requirement that a federal question be raised in the state court is to provide the state with an opportunity to itself correct errors of federal proportion. However, there is no requirement that a specific form of words or phraseology be employed to raise the federal question. *Green Bay & Canal Co* v *Patten Paper Co,* 172 US 58, 68 (1898); *New York ex rel Bryant* v *Zimmerman,* 278 US 63, 67 (1928); *Street* v *New York,* 394 US 576, 584 (1969). Consistent with the purposes served by the jurisdictional prerequisite, all that is required is efforts by the Appellant to bring the federal question to the attention of the state court. *Green Bay & Canal Co, supra; Street* v *New York, supra; Live Oak Association, supra.*

As set forth as pages 3-4 of the Jurisdictional Statement, Appellant pointedly addressed the attention of the state court on direct review, prior to decision, to many of the decisions of this Court upon which resolution of the First Amendment issues must turn. Indeed, the free speech guarantees of the First Amendment were specifically cited as were the correllative constitutional rights of the recipients of the communications here in issue. The constitutional questions posed here have, then, been brought to the attention of the state court with more than sufficient force to permit the state court to consider the free speech implications of its decision.

The efforts of the state court to distinguish the under-

lying First Amendment rationale of *Bates* v *State Bar of Arizona,* 433 US 350 (1977) shows that the state court itself recognized the federal question that had been presented to it. As pointed out at page 4 of the Jurisdictional Statement, this aloné demonstrates state court consideration of the federal question such that this court's jurisdiction would have been properly invoked even in the absence of briefing by Appellant in that court. Additionally, the state court decision affirming Appellant's decision inherently required disposition of the federal claim. He could not have been suspended unless the free speech issue had been disposed of adversely. There is no requirement that the state court deal with the issue in any specified degree of detail, for otherwise, the state could insulate its decisions on federal questions from review by this Court by the simple expedient of failing to articulate the grounds of decision. The dual elements of presentation by Appellant and decision by the state court place this case in a markedly different posture than those upon which Appellee relies. Because of these dual elements, the jurisdictional prerequisites of 28 USC §1257(2) have been satisfied on direct review.

While consideration of the rehearing petition is therefore unnecessary, it too provides the basis for relief. As Appellee concedes, the rehearing petition provided the state with an even greater opportunity to decide the federal question, as the question was presented with even greater forcefulness. Moreover, the denial of rehearing reflects that the state court did consider the merits of the federal issue. In denying the petition, the justices necessarily disagreed with the dissenters who thought the *Edna Smith Primus* and *Albert Ohralik* cases, now pending in this Court, would be decisive. As the state court considered the merits of the federal question in denying the petition for rehearing, this

case is squarely within the ambit of the rule that this Court's jurisdiction is properly invoked when the state court considers the merits of the federal question presented on rehearing. *Mallett* v *North Carolina,* 181 US 589, 597 (1901).

Finally, the general doctrine that presentation of the federal question for the first time on rehearing does not preserve the question for review is not an inflexible one. The federal question is timely presented on rehearing when a novel construction is imposed on direct review such that rehearing provides the first opportunity to present the federal question. This is explicitly recognized in *Brinkerhoff-Farris Co* v *Hill,* 281 US 673, 678 (1929) which is cited in Appellee's Brief. Indeed, cases finding the lack of jurisdiction make it clear that the denial of jurisdiction is premised on the absence of a new construction by the state court. *Herndon,* 295 US at 443-444; *American Surety Co,* 287 US at 164.

Herndon is particularly illustrative. There, the Court recognized that rehearing would have properly preserved the federal question if the ruling of the state court on direct review could not have been anticipated. Dismissal was squarely predicated on the fact that a prior state case had adopted the same construction imposed in *Herndon.* By way of contrast, the Michigan Supreme Court has never before construed the Disciplinary Rules in the fashion here employed. It is that very novel construction which makes the Michigan Disciplinary Rules so vulnerable to constitutional attack. Under these circumstances, the federal question has been presented at the first opportunity. See Jurisdictional Statement, pages 4-5.

In an effort to bolster the argument that this Court lacks

jurisdiction, Appellee places his reliance on *Whitney* v *California,* 274 US 357 (1926). That case is, indeed, enlightening. It demonstrates even more forcefully that this Court's jurisdiction has been properly invoked in this case. In *Whitney,* this Court accepted jurisdiction and resolved on their merits the constitutional claims raised, despite the fact that "here the record does not show the defendant raised or that the state court considered or decided any Federal question what-ever . . . [except by virtue of a stipulated post-decision order]."

Any effort to read *Whitney* as a broad jurisdictional hurdle is destined to failure by reason of *Konigsberg* v *State Bar of California,* 353 US 252 (1957). While the dissenting justices referred to *Whitney,* the *Konigsberg* majority recognized its jurisdiction despite the inartfulness with which the federal question was raised in the California court. There, the federal question was held to have been properly preserved for presentation to this Court when it had been presented to the state court only as a sweeping allegation in the petition for review. Accordingly, this Court's jurisdiction was properly invoked in *Konigsberg, despite the fact that the question had in no way been briefed or the state court referred to the controlling authority.* A fortiori, there is jurisdiction to decide this case where the federal question was amply briefed on direct review by the Michigan Supreme Court.

For all of the foregoing reasons, jurisdiction is properly vested in this Court to decide whether the Constitution of the United States is contravened by the imposition of discipline for the conduct in question and by the procedures employed in the state. The cases upon which Appellee relies for a contrary conclusion are inapplicable in fact and in law.

REPLY TO APPELLEE'S SUBSTANTIVE ARGUMENT

Without knowing the specific cases to which Appellee refers in support of the suggestion that this Court is reluctant to review state bar disciplinary cases, it is impossible to comment with precision on the purported statistical analysis found at page 6 of the Motion. The contention that this Court has only once reversed the state disciplinary proceedings is, however, frivolous. See *Spevack* v *Klein*, 385 US 511 (1967) and *Bates* v *State Bar of Arizona*, 433 US 350 (1977) for but two examples. In addition, the analogous decisions of state bar organizations not to permit persons to be admitted to the practice of law in the first instance have been overturned by this Court as well. *Schware* v *Board of Bar Examiners*, 353 US 232 (1957); *Konigsberg* v *State Bar of California, supra*. As the major premise underlying the Administrator's argument is untenable, it is unnecessary to demonstrate at length the self-evident fallacy of the argument that the supposed insubstantiality of the issues raised by *other* litigants is of any significance to the question of whether the distinct issues raised by *this* litigant warrant formal submission.

It is, of course, true that in *Theard* v *United States*, 354 US 278 (1957); *In re Ruffalo*, 390 US 544 (1968); *In re Isserman*, 345 US 286 (1953) and *Selling* v *Radford*, 243 US 46 (1917) this Court did not disturb state decisions precluding an attorney from state courts. But it is sheer sophistry to argue, as does the Administrator, that this is because such proceedings enjoy some sort of special immunity from this Court's review powers. In none of the above cases did this Court review the banishment from state courts! In each, this Court was faced only with ancillary federal proceedings to bar the attorney from *federal*

courts. That this Court has not reversed proceedings which were never reviewed can lend no precedential force to the Administrator's argument that it must refrain from deciding a case such as this where an appeal *is* taken from the state-imposed discipline.

Compounding the Administrator's misconception that the state occupies a position of supremacy in the construction and application of the Constitution of the United States (See Jurisdictional Statement, pp. 20-22) is the contention (Motion, page 11) that "This Court does not sit as a reviewing Court of any claimed errors by the lower Court." To be sure the highest state court is the final authority on pure questions of state law. But it may be said, with equal confidence, that the Supreme Court of the United States is the highest authority for the construction and application of the Constitution of the United States. Where the state, by its actions, has infringed upon those rights conferred by that Constitution, this Court has shown no reluctance to correct those errors by the state court which are of constitutional dimensions. *Bates* v *State Bar of Arizona, supra; Spevack* v *Klein, supra; Schware* v *Board of Bar Examiners, supra.* As the court in *Konigberg* v *State Bar of California, supra* explained, it is the United States Constitution, here in issue, that limits the court's review powers:

"We recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner. Nor in such way as to infringe on the freedom of political expression or association."

"A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal. It is also important to society that

lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar". 353 US at 273.

It must be borne in mind that those provisions of the Constitution upon which this appeal is premised, Article 6, Clause 2, the First Amendment, and the Fourteenth Amendment, are all explicit limitations on what the state may do. Those provisions necessarily contemplate the role *of this Court* in assuring that those limitations have not been overstepped by the state. Resort by Appellant to the aforesaid constitutional provisions limiting the exercise of state power is a *prerequisite* to the invocation of Supreme Court jurisdiction, not as Appellee suggests, an *impediment* to the exercise of that jurisdiction.

Appellee misapprehends the thrust of the associational guarantees embodied in the First Amendment when he argues (Motion at page 9) that those guarantees are inapplicable because "Appellant was seeking the union to join in a class action for the benefit of his client in purely personal litigation". That proposition is not well founded in law or in fact.

The proposed mandamus action was, of course, a matter of acute interest to Appellant's client who wished a competent investigation into the cause of his son's death. Yet it is hard to discern a compelling state interest in enacting regulations which the state has interpreted so as to punish an attorney for seeking to vindicate the interests of his client. Over and above the personal interest of Appellant's client in the mandamus litigation, Mr. Woods was assuredly not the only one interested in securing a Coast Guard investigation any more than the nominal plaintiffs in the desegregation litigation examined in *NAACP* v *Button*, 371 US

415; 83 S Ct 328; 9 L Ed 2d 405 (1963) were fostering "purely personal litigation". A thorough Coast Guard investigation would benefit an all too large number of others who lost loved ones in the tragic explosion, as well as Mr. Woods himself.

Indeed, the mandamus action was of interest to a number of workers and their families concerned about working conditions that take their toll in human lives. A thorough investigation could also be expected to reveal the cause of the explosion so that efforts could be taken to prevent a recurrence. The successful elimination of unsafe working conditions would serve a wide range of public interests as well as the interests of Appellant's client. Thus the characterization of the proposed litigation in the nature of a class action as "purely personal litigation" is inaccurate. Any multi-plaintiff litigation by definition involves more than rights of a single person.

Nor can the litigation be characterized as legal action for the benefit of the involved attorney. The services of Appellant were to be provided to his client at no cost and any ancillary services to other plaintiffs were also to provided without cost. In *NAACP* v *Button*, the staff attorneys were to receive from the organization attorney fees, but this factor was held not to deprive the activities of their constitutionally protected status. The efforts of Appellant provide an even stronger factual basis for upholding the applicable First Amendment associational guarantees.

The efforts of Appellee to distinguish this case factually (Motion at pages 7-9) must also be roundly rejected. In deciding *NAACP* v *Button*, supra, this Court made it exquisitely clear that the associational guarantees recognized in that case could not be confined to the unique organiza-

tional goals of the NAACP or the particular litigation there in question. 371 US at 444-445. In the wake of *NAACP* v *Button,* this Court has repeatedly held that an attorney and union may join forces even in fee-generating personal injury litigation and that the State may not permissibly interfere with this relationship. *Union Mine Workers, District 12* v *Illinois State Bar Association,* 389 US 217 (1963); *Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1 (1964); *United Transportation Union* v *State Bar of Michigan,* 401 US 576 (1971).

It may well be that the state has a genuine interest in preventing lawyers from perpetrating fraud upon consumers of legal services. But this objective can no more justify the total proscription imposed by the Michigan Disciplinary Rules than the state's interest in protecting its citizens from hard core pornography justifies burning all books. The notion that First Amendment rights must be sacrificed to accommodate regulations so overbroad as to prohibit constitutionally guaranteed freedoms has long been discredited by the cases referred to in the preceeding paragraph. Also discredited, incidentally, is *Cohen* v *Hurley,* 366 US 117 (1961), relied on by Appellee (Brief at p. 10). This Court has explicitly repudiated *Cohen* in *Spevack* v *Klein,* 385 US 511, 514 (1967).

This is not to suggest that the state is impotent to deal with conduct by attorneys that conflicts with a compelling state interest. To survive constitutional scrutiny, the state must only identify those unprotected actions which are evil and conflict with compelling state policy and tailor the Discipinlary Rules to that conduct. What the state may not constitutionally does is prohibit an attorney from cooperating with a union in the representation of an existing

client in the name of forbidding a lawyer from sending a runner ("with sophisticated electronic devices and radio", Appellee's Motion, p. 10) to an acciden scene ahead of the police to harass an accident victim.

Appellee also takes solace in the observation (Motion, page 10), "that there was adequate evidence of 'solicitation' ". The problem is that the term "solicitation"; which has come to be used as an epithet by bar disciplinarians unable to address the character of the conduct and communications in question, lacks a precise definition that gives the term any real meaning. Indeed, "solicitation" is not, as such, either forbidden by, or defined in, the Disciplinary Rules. Rather, they prohibit a whole host of attorney communications far broader than those which fall within the common understanding of solicitation. To a large extent, it is the very nebulous quality of the word, as well as the tendency of the organizeed bar to rely on home-spun definitions in support of constitutionally untenable prohibitions, that has required this Court to repeatedly reaffirm that it will not permit the facile use of the word solicitation to distract it from its obligation to compare the *conduct* with the rigorous limitations of the First Amendment. *NAACP* v *Button,* 371 US 415, 429 (1963); *Bates* v *State Bar of Arizona, supra; Brotherhood of Railroad Trainmen* v *Virginia,* 377 US 1, 6 (1964).

There is, of course, ample evidence that Appellant, in the representation of his client, sought joinder by the union and affected members in the mandamus action. If this is solicitation, it is made so only by the unorthodox definition employed. To suggest that the Administrator's use of the term makes Appellant's conduct any less constitutionally protected is about as persuasive as the contention that a

round Earth is made flat by the consensus pre-Columbus view of the world.

The same comments are appropriate in response to the suggestion that there was evidence that Appellant asked McLaughlin to recommend him to individual claimants. All participants testified that there was a single meeting at which Appellant and McLaughlin were present, that the purpose of the meeting was to discuss the proposed mandamus action and the advisability of framing the action as multiple-plaintiff litigation, and that this was in fact the tenor of the discussions. In addition, all those present who were called as witnesses testified that Appellant did not ask McLaughlin to recommend him to those with death and personal injury claims arising from the explosion.

Appellant himself swore that he had not done so. McLaughlin also pointedly affirmed that he had not been asked by Appellant to recommend him to potential personal injury claimants. See Jurisdictional Statement, page 13. Marilyn Jean Kelly, associate attorney with Appellant's firm, lent confirmation by her testimony that no such request was among the topics discussed by Appellant and McLaughlin. The priest, Father Luigi Maggioni, and two laborers present at the meeting, Donald Davis and Maruin Gill, also testified that the topic of discussion at the meeting was the mandamus action and that Appellant made no request to be recommended as counsel for those who were possessed of individual causes of action.

Simply stated, there is absolutely no evidence of solicitation in the conventional sense. It cannot be presumed that the Michigan Supreme Court could have found a violation of the Disciplinary Rules on the basis of the testimony set forth above, for to have done so would constitute the

grossest violation of due process. *Thompson* v *City of Louisville,* 362 US 199 (1960). It is, then, that evidence which is recited in the state court opinion and made the subject of the Stipulation of Facts (Jurisdictional Statement, 42a-44a) demonstrates the outlandish construction imposed on the Disciplinary Rules.

Appellant testified that agreements to represent, for purposes of the mandamus action only, were present at the meeting. He steadfastly denied that there were contingent fee agreements present. This position was supported by Father Maggioni, Mr. Gill and Mr. Davis who testified of having seen no such documents. Marilyn Jean Kelly testified that there were contingent fee agreements on a table, but she did not know how they had gotten there or what had happened to them.

Of necessity, then, it is the testimony given by McLaughlin, the business agent, which provides the basis for the discipline imposed. This is made eminently clear by the state court decision as well as the Stipulation of Facts. It is that very testimony which underscores the unprecedented construction of the Disciplinary Rules imposed by the state court in reaching its decision.

The business agent testified the meeting with Appellant was for the sole purpose of discussing joinder in the mandamus action. At the time, McLaughlin had undertaken the obligation of finding attorneys to represent the union members injured and the survivors of those who had been killed in the explosion. This undertaking was not expressed to Appellant prior to the meeing. When McLauglin told Appellant that he was seeking counsel, he asked for and received business cards and form contracts from Appellant

who said that McLauglin could distribute the cards if he wanted to. This, then, is the testimony most favorable to the Administrator. It is recited with reliance in the state court Opinion and is identified as such in the Stipulation of Facts. If this is "solicitation", it is not made so by any conventional definition. By whatever name it is called, it is conduct protected by the United States Constitution.

WHEREFORE, Appellant prays that this Honorable Court note probable jurisdiction and, upon full review, reverse the decision of the state court.

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